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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 284

JOSEPH M. TROHEY, Administrator of the Estate of MARIA G. MUNA, deceased, *et al.*,

Petitioner,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to The Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on May 5, 1958.

Opinions Below.

Although this was a case of novel impression based upon newly created statutory rights in admiralty, the District Court wrote no opinion or memorandum of decision. The opinion and judgment of the United States Court of Appeals is printed in Appendix A hereto; the opinion is not yet reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 5, 1958. Rehearing was denied on July 14, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. A., Sec. 1254(1).

Questions Presented.

The principal questions involved herein are the following:

1. Does the doctrine of *res ipsa loquitur* apply against an air carrier of passengers and a maintenance firm, or either, sued in admiralty for damages for the wrongful death of a fare-paying passenger in an unexplained crash of an airplane on the high seas?

2. If the doctrine of *res ipsa loquitur* applies against an air carrier of passengers sued in admiralty for damages for the wrongful death of a fare-paying passenger in an unexplained crash of an airplane on the high seas, does it require such carrier to adduce some evidence to rebut the inference of the carrier's negligence arising from such unexplained crash of the plane?

3. Is it reversible error for the trial court to refuse a timely requested conclusion of law upon a material litigated issue of law?

We believe that the answers to all three of these questions should be "Yes". We believe that the effect of the decisions below was to answer them "No".

Statute Involved

This action was brought under 46 U. S. C. A., Secs. 761-767, popularly known as "Death on the High Seas Act." Section 761 of 46 U. S. C. A. provides:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

Respondents do not contend that the Act does not apply to air carriers; but they did contend in the trial court that the doctrine of *res ipsa loquitur* does not apply to cases brought under said Act, because such cases are in admiralty. The District Court accepted that view. However, during the course of appeal, respondents all but abandoned it in favor of their current position that the doctrine of *res ipsa loquitur* when applied in admiralty gives rise merely to a permissible inference of negligence which the trial court may but need not draw. The Court of Appeals appears to have sustained this position without recognizing that the District Court never accorded to itself the right to draw a permissible inference, and without distinguishing common carrier-passenger cases which endow the doctrine with more effect than a mere permissible inference from all other types of *res ipsa* cases which under Federal practice do not.

Summary Statement.

This is an action for damages for the wrongful death of three fare-paying passengers killed in the crash of a DC-6 Aircraft, N 90806. Respondent Transocean Air Lines, Inc. (hereinafter, sometimes Respondent Transocean) owned and operated the aircraft; Respondent Slick Airways, Inc., maintained the aircraft; and Douglas Aircraft Company, Inc., originally a defendant but not pursued here, manufactured it.

The crash of the aircraft occurred in the Pacific Ocean approximately 340 miles east of Wake Island.[1] The District Court had jurisdiction under the provisions of the Death on the High Seas Act, 46 U. S. C. A., Secs. 761-767. Although filed on the law side, the action was by the Court transferred to the admiralty side of the docket and was thereafter tried in admiralty before the Honorable Thurmond Clarke, District Judge, sitting without a jury.

Both in the pre-trial proceedings and at the outset of the trial, petitioner (plaintiff below) contended that the doctrine of *res ipsa loquitur* was applicable as against the air carrier and the maintenance company. [V. 1, R. 35, 37.][2] The trial court ruled that *res ipsa loquitur* did not

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[1]Inadvertently, the Court of Appeals stated the time and place of crash as 15 minutes after takeoff and 100 miles east of Wake Island (Opinion, p. 3). The difference is important as it underscores the absence of evidence of the manner of operation by the pilots at and immediately prior to the crash. The burden of going forward with such evidence was upon the common carrier, Respondent Transocean.

[2]References to the Record in the Court of Appeals are designated "R. ....". The Record herein comprises 9 volumes. Volume 1 contains the Clerk's Transcript, and Volumes 2 to 5 contain the Reporter's Transcript of trial proceedings. Since both Volumes 1 and 2 commence numbering with Page 1, references to pages in Volume 1 will expressly indicate that volume by "V. 1".

apply in admiralty [R. 90], and required petitioner to put in evidence of specific acts to show, or that would tend to show, negligence on the part of respondents. On their part, respondents offered no evidence whatever to explain the cause of the fatal crash or show proper care in all respects required of them. Nevertheless, the Court gave judgment for respondents, from which petitioner appealed. [V. 1, R. 51, 57.]

The pertinent facts are these: On July 12, 1953, at 0004 (all times noted in Greenwich Civil Time and on 24-hour clock), the aircraft involved departed from Guam eastbound for Oakland, California, as Flight 512, carrying 49 passengers and a crew of 8. [R. 53.] Intended en route stops were Wake Island and Honolulu. [R. 53.] The aircraft landed at Wake Island at 0539, refueled, and departed at 0658. Fifty passengers were then aboard, including petitioner's intestates Maria G. Muna, Francisco G. Muna, and Catalina Manalisay Guiterrez. [R. 54.] The persons named were passengers for hire who had boarded the aircraft at Guam. [R. 54.]

At 0729 the aircraft radioed a position 100 miles east of Wake Island, and that it had reached its assigned cruising altitude of 15,000 feet two minutes earlier. [R. 57.] At 0828 the aircraft radioed that it was cruising at 15,000 feet between cloud layers. [R. 58.] The radio message included no report of or reference to air turbulence or weather phenomena, and no indication of any difficulties. [R. 58.] This was the last radio contact with the flight. [R. 58.]. Approximately 12 minutes there-

after the plane crashed into the Pacific Ocean, killing all of its 58 occupants. [R. 59.] A search for the aircraft resulted in the recovery of some wreckage of the plane and 14 floating bodies. [R. 185.]

Douglas Aircraft Company manufactured the plane in question in 1949 [R. 42] and sold it to Slick Airways in April, 1951. [R. 42-43.] Slick operated it as a cargo plane until June, 1952, when it installed a passenger interior, and sold the plane to Respondent Transocean. [R. 43-44.] At all times thereafter Transocean operated the aircraft in flights between all or some of the following points: Burbank, Oakland (both in California), Honolulu, Wake Island, Guam, and Tokyo. [R. 44.] In such operations, Transocean acted as a common carrier [R. 44] under its authority from the Civil Aeronautics Board as a large irregular (nonscheduled) air carrier. [R. 356-357.] During this period Slick performed maintenance work on the plane from time to time, at Burbank, California, under a written contract with Transocean at stipulated rates [R. 45, Pltf. Ex. 6] to keep the plane in airworthy condition.

Petitioner is the administrator of the estates of Maria G. Muna, her son Francisco G. Muna, and Catalina Manalisay Guiterrez [R. 345] and sued as such for the benefit of the estates of said persons.

The Court of Appeals appears to have been in some doubt as to whether the District Court refused to apply the doctrine of *res ipsa loquitur* in this case. We believe

the record speaks for itself on this.[3] At the outset of trial, petitioner requested a ruling on whether or not *res ipsa* applied. The District Court made a ruling, referred to it as a ruling, and all opposing counsel acquiesced in it as a ruling. The Court concluded his statements upon the subject with "I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's *ruling*." (Italics added.) When appellant's counsel asked whether the subject was "still open for consideration at a later date," the trial judge did say yes, undoubtedly as a concession. *At best, this can be construed as no more than saying his ruling was "without prejudice."* However, it would have taken a new and different ruling to eliminate the effect of the first one. This record is barren of such.

In addition, petitioner timely objected to the omission from the conclusions of law of any mention of applicability, or nonapplicability, of the doctrine of *res ipsa loquitur*, although the issue was raised in the pre-trial proceedings and at the outset of the trial.

Other facts adduced in evidence by petitioner-plaintiff show, or tend strongly to show, that there must have been some mechanical failure of the aircraft, or a failure of the operating personnel to exercise proper control thereof, that resulted in the crash of the plane. These facts are:

1. In the report radioed from the plane a few minutes before the crash no mention was made of weather turbu-

[3]As set forth at length in Appendix B.

lence or other phenomena. Moreover, within a very short time after the crash, another plane reported from or near the crash area favorable weather conditions. [R. 58.]

2. There was no fire, or explosive action, in the plane, because the 14 recovered bodies showed no signs of burns. [R. 184.]

3. The weather was not unusual or rough, because all of the recovered bodies, except three, showed no seat-belt lacerations on the victims. [R. 186.]

4. The plane nose-dived almost vertically into the ocean, because the fractures found in the bodies recovered could be referable only to a vertical fall of the plane. [R. 189.]

The facts and conclusions stated in paragraphs numbered 2, 3 and 4, *supra*, are those of Michael Gerundo, M.D., Medical Examiner of Guam, who performed autopsies upon some of the 14 bodies recovered from the sea after the crash. [R. 181, 183.] Dr. Gerundo is an experienced pathologist [R. 181] and his conclusions, based upon medical evidence, furnish the only reliable uncontradicted indication concerning factors that did or did not exist aboard the plane when it crashed. [R. 189.]

Petitioner also introduced other evidence showing:

1. *Faulty maintenance of the auto-pilot*, or instrument system used for flight control at cruising altitudes in long water-flights. The pilots of the plane had previously made numerous complaints or "squawks" about the tendency of the plane to lose altitude when flying under

auto-pilot control—one such "squawk" being only a short time before the last flight of the plane from Oakland to Guam.

2. *Inadequate pilot training*; including failure of both pilot and co-pilot to take important and required training in emergency procedures.

3. *Scheduling pilots for excessive hours of duty*, thereby inducing fatigue. At the time of the crash the pilots had been on duty 28 hours out of the last 42 hours. A qualified professor of physiology at U. C. L. A. with a specialty in aviation medicine testified that in his opinion the pilots were in a state of fatigue at the time of crash. This testimony was uncontradicted.

4. *Lack of test flights* after the doing of repair or maintenance work on the plane, especially after repairs on a vital auto-pilot amplifier. A malfunction of the gyro in this unit would have caused the violent reaction and down-pull to the aircraft noted in the log on May 28, 1953, yet the gyro was not checked and the amplifier itself actually was operated in excess of its prescribed operating limits of time.

Respondents offered no evidence at all concerning the cause of the crash. Their evidence was purely negative to petitioner's evidence and as to certain aspects thereof only.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Decided an Important Question of Law in a Way That Conflicts With Established Law.

A. Scope and Basis of Court of Appeals' Decision.

The Court of Appeals said: "We are unable to determine from the record whether or not the trial judge applied the doctrine (of *res ipsa loquitur*) in this case. He originally felt that it did not apply; he required appellants to produce evidence as to defendant's alleged negligence * * *." The Court of Appeals later said: "* * * if *res ipsa loquitur* should have been applied by the trier of fact, and was not, the application of that doctrine alone to the facts of this case is not sufficient to require a judgment as a matter of law for plaintiffs." Yet in so reasoning the Court of Appeals denied petitioner's passengers the benefit of even a permissible inference from *res ipsa*. For with the trial court's refusal to apply the doctrine, nothing else could supply (1) an inference of negligent conduct by the carrier on the occasion in question, and (2) an inference of proximate cause. Thus, in the trial court's final view, the scales remained evenly balanced, and we failed to carry our burden of proof. It was to fill just such a gap that the doctrine of *res ipsa loquitur* was intended. As approved by the same Court of Appeals (Opinion, p. 7) in *Des Marias v. Beckman*, 198 F. 2d 550:

> ". . . the function of the doctrine, as stated in the introduction to Shain's Res Ipsa Loquitur, is to supply a fact, i.e., defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury

suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed."

To say (Opinion, p. 4) that with or without *res ipsa* we do not show a *clear* preponderance of evidence in the Court of Appeals wholly fails, we submit, to give us the benefit of the rule in the trial court where all we are required to show is a *mere* preponderance of evidence. Especially is this true where as here the evidence is all circumstantial to the cause of crash.

The Court of Appeals asked itself the question, "Does *res ipsa loquitur* apply in admiralty cases?" It then proceeded to decide the case on the basis of the decisions of this Court in *Sweeney v. Erving*, 228 U. S. 233; *Jesionowski v. Boston & Maine R.R.*, 329 U. S. 452; and *Johnson v. United States*, 333 U. S. 46. None of these cases is a passenger-carrier case. The *Sweeney* case was against a physician for damages for injuries sustained in making X-ray tests. The *Jesionowski* case was for damages for the death of a railroad employee (a switchman) caused by the derailment of a car upon which decedent was riding, allegedly caused by a defect in said car or the track, or roadbed of the defendant Railroad. The *Johnson* case was for damages for personal injuries sustained by a seaman caused by a block falling upon plaintiff's head, which block was being handled by another seaman. These three cases do not state the true rule applicable in a passenger-common carrier case, although

there are numerous expressions of opinion therein that are helpful in our case. For example, in the *Johnson* case it is said: "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events. * * * The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act." (*Id.*, 333 U. S. at pp. 49-50.) In the dissenting opinion in that case, Mr. Justice Frankfurter said: "If (*res ipsa loquitur*) is, after all, a 'rule of necessity to be invoked only when necessary evidence is absent and not readily available.' (See, Cooley, Torts, 4th Ed., sec. 480.)" (333 U. S. 53.)

In the case at bar there was no survivor among crew members and passengers. The accident was not explained, and perhaps cannot be explained. Indeed, Respondent Transocean and Respondent Slick stipulated at the pretrial conference that they "are not aware of any facts which reasonably could have caused this accident and intend to offer no evidence tending to show such cause." [V. 1, R. 30-37.] Nor did Respondents offer any evidence to show or to explain the cause of the accident. Under such circumstances we submit that the inference of negligence required a judgment in favor of the petitioner of a matter of law where, as here, a passenger-carrier case exists and the inference is not rebutted by any evidence at all.

B. The Decision of the Court of Appeals for the Ninth Circuit Conflicts With Other Decisions of Said Court.

The case of *Des Marias, et al. v. Beckman*, 198 F. 2d 550, involved almost identical facts to those involved in the case at bar. The airplane upon which plaintiff's decedent was a passenger in that case disappeared without a trace during flight although no icing or storm conditions prevailed along its route. It was flying from Alaska to the United States. The Court of Appeals affirmed the judgment of the District Court of Alaska in a *Per Curiam* Opinion. Reference to the opinion of the District Court, 100 Fed. Supp. 1, shows that judgment was for the plaintiff. It was contended that *res ipsa loquitur* applied and the Court so held, saying, at page 2:

> "The question presented, therefore, is whether the doctrine of res ipsa loquitur applies where the plane disappears during flight without a trace. The defendant's contention that the doctrine is not applicable to a case such as this is based primarily on the ground that since the plane disappeared without a trace, the defendant can have no knowledge of the cause of the loss of the plane superior to that possessed by the plaintiffs. * * * Since inability, because of lack of knowledge, to show specific acts of negligence is a prerequisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine, as stated in the introduction to Shain's Res Ipsa Loquitur, is to supply a fact, i.e. defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff.

but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar. * * *

"I am of the opinion that the doctrine of res ipsa loquitur is applicable and that the motion to dismiss should be denied. Seaman v. Curtiss Flying Service, 231 App. Div. 867; 247 N. Y. S. 251; Smith v. Pacific Alaska Airways, 9 Cir., 89 F. 2d 253; Pacific Alaska Airways v. Mahan, 9 Cir., 89 F. 2d 255. Judgment may accordingly be entered for the plaintiffs."

The decision also conflicts with the decisions of said court in *Smith v. Pacific Alaska Airways*, 89 F. 2d 253; *Pacific Alaska Airways v. Mahan*, 89 F. 2d 255; and *Bergen v. United States*, 222 F. 2d 949. In the *Bergen* case, plaintiff was a passenger of the Alaska Railroad, a Government instrumentality, at the time the car in which he was riding derailed and turned over. The District Court gave judgment for defendant on the ground that there was no showing of negligence. Held, *reversed*. The Court states (p. 950):

"The cause of the wreck we do not know. * * * However, we believe that this was clearly a case of an instrumentality and events solely within the control of the defendant and a case for the application of *res ipsa loquitur*. The burden of going forward on negligence was upon defendant, and the plaintiff's abortive attempt to prove the cause of the wreck, we hold, did not remove this burden."

C. The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court.

It has been settled law since *Stokes v. Saltonstall* (1839), 13 Pet. 181, 10 L. Ed. 115, that upon the happening of an injurious accident in passenger cases that fact alone is *prima facie* evidence of negligence on the part of the carrier, and that where the passenger is without fault, the burden rests upon the carrier to show that it fully performed its whole duty and that the accident was unavoidable.

Stokes v. Saltonstall (1839), 13 Pet. 181, 10 L. Ed. 115;

N. J. R.R. Company v. Pollard, 22 Wall. 341, 22 L. Ed. 877;

Pennsylvania Company v. Roy (1880), 102 U. S. 451, 455-456;

Gleeson v. Virginia Midland Ry. Co., 140 U. S. 435.

The *Stokes* case, *supra*, was for injuries sustained by a passenger caused by the upsetting of a stagecoach. The Court held the carrier liable on the mere showing, without explanation by the carrier, of the upsetting of the coach.

In *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, the Court stated the rule here applicable in the following language:

> "Since the decisions in *Stokes v. Saltonstall*, 13 Pet. 181, and *Railroad Company v. Pollard*, 22 Wall. 341, it has been settled law in this court that the happening of an injurious accident is in passenger

> cases *prima facie* evidence of negligence on the part of the carrier, and that (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by human foresight. The rule announced in those cases has received general acceptance; and was followed at the present term in *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551."

The other cases cited, *supra*, all hold to the same effect.

That the federal rule of *res ipsa* in carrier cases is *not* merely a permissible inference was recognized in an annotation, "*'Res Ipsa loquitur' as a presumption or a mere permissible inference*," 53 A. L. R. 1509, where it is said:

> "Even in the United States Supreme Court (although this court is generally credited with having adopted the theory that the doctrine of 'res ipsa loquitur' is a mere permissible inference), the rule is that the happening of an injurious accident, in passenger cases, prima facie, is evidence of negligence on the part of the carrier, and, the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that his whole duty was performed and that the injury was unavoidable by human foresight."

The rule is stated in substantially the same language in 65 C. J. S. 996, Sec. 220(3)b.

D. The More Recent Decisions of This Court, Cited in the Opinion Below, Are Not in Conflict With the Rule Stated in C, Supra.

The Court of Appeals relied strongly on *Sweeney v. Erving*, 228 U. S. 233, in holding in the instant case that the unexplained crash of a passenger plane on the ocean merely warrants an inference of negligence, but does not compel it. From this, the Court states the burden of proof remains with plaintiff, and, apparently, plaintiff must adduce other evidence of negligence. The lower court failed to note that in the *Sweeney* case, the rule here invoked was given full recognition in the following language (33 S. Ct. 417-418):

> "The general rule in actions of negligence is that the mere proof of an 'accident' (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res ipsa loquitur*,—the thing speaks for itself; that is to say, *if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.*" (Emphasis added.)

In the case at bar the respondents made no effort "to explain or rebut the inference that" arose from the crash of the plane at sea; therefore, the crash "may fairly be inferred to have been occasioned by negligence."

In *Johnson v. United States*, 333 U. S. 46 (which involved injury to a seaman), this Court had no difficulty in applying the rule of *res ipsa loquitur* where the dropping of a block upon plaintiff, being handled by a fellow servant, was unexplained. This Court, by Mr. Justice Douglas, said (*Id.*, pp. 49-50):

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events. In this case the District Court found negligence from Dudder's act of dropping the block since all that petitioner was doing at the time was coiling the rope. The Circuit Court of Appeals reversed, 160 F. 2d 789, feeling that petitioner might have pulled the block out of Dudder's hands. It reasoned that although petitioner testified he was bending over coiling the rope when the block hit him, the concussion may have caused a lapse of memory which antedated the actual injury. The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act."

In *Jesionowski v. Boston & Maine R. R.*, 329 U. S. 452, this Court quoted and approved the rule of *res ipsa loquitur* as stated in *San Juan Light & Transit Co. v. Requena*, 224 U. S. 89, as follows:

> "When a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such, as in the ordinary course of things, does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care."

The Court thus held that the unexplained happening of an injury not only creates an inference of negligence on the part of a defendant, but that "it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant's want of care." It may be noted that *res ipsa loquitur* was applied in the *Jesionowski* case notwithstanding the fact that there was evidence that the instrumentality causing the accident was not wholly under the control of defendant.

II.

The Court of Appeals Erred in Holding, as a Matter of Law, That the Inference of Negligence Arising From the Unexplained Crash of the Plane at Sea Was, by Itself, Insufficient to Support a Judgment for the Petitioner.

The Court of Appeals paid only lip service to the doctrine of *res ispa loquitur*. This, we believe, is made clear by many statements in the Court's opinion, including the following:

> "We cannot say as a matter of law that had the rule (*res ipsa loquitur*) been relevant and applicable here it could by itself require or sustain a verdict for plaintiff.
>
> "The facts of an unexplained crash into the ocean may warrant an inference of negligence, but do not compel that inference."

The Court thus said, in effect, that even if the doctrine did apply to the instant case, the trial court could disregard it in arriving at its judgment.

In this case the *inference* of negligence arising out of the unexplained crash of the plane was not rebutted, since Respondent Transocean offered no evidence tending to show the cause of the accident or that it acted with utmost prudence on the occasion in question.

In *Patton v. Texas & P. R.R. Co.* 179 U. S. 658, it was said that

> "* * * in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of a carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely (citing cases) * * *."

The cases cited by the Court are *Stokes v. Saltonstall*, 10 L. Ed. 1115; *New Jersey R & T Co. v. Pollard*, 22 L. Ed. 877; *Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435, all of which have been cited and discussed herein, *ante*.

It is obvious that in the instant case the Court of Appeals relied upon the narrow, out-of-context, phrase found in *Sweeney v. Erving*, 228 U. S. 233, 240, that "the facts of the occurrence warrant the inference of negligence, not that they compel such an inference." As already noted, the *Sweeney* case was against a physician for damages for injuries sustained in making X-ray tests, and did not involve a carrier-passenger relationship. The Court's use of the word "inference" in the *Sweeney* case has been construed in numerous cases as *not* meaning "presumption," but the words are synonymous. (Webster's Int. Dict. 2d Ed.; Bouvier's Law Dict. 3d Rev.) In any event, however, the statement in the *Sweeney* case that an unexplained injurious accident does not compel the inference of negligence cannot justify the ruling by the trial judge that the doctrine of *res ipsa loquitur* does not apply in the case at bar. Moreover, the *Sweeney* case itself states that "if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence." And, as also stated, *ante*, this Court and other federal courts in later cases have found no difficulty in applying the doctrine where an unexplained accident is involved and the plaintiff is without fault. And, this is especially true in carrier-passenger cases. (*Bergen v. United States*, 222 F. 2d 949; *Austerberg v. United States*, 169 F. 2d 583, 591; *Matsumoto v. Chicago & N. W. Ry. Co.*, 168 F. 2d 496; *Des Marias v. Beckman*, 198 F. 2d 550, aff. *Haasman v. Pacific Alaska Air Express*, 100 Fed. Supp. 1.)

III.

The Court of Appeals Erred in Holding That It Could Not Reverse the Judgment Below Because the Trial Judge Had Found That the Preponderance of the Evidence Favored the Defendants.

There is no factual basis in the evidence for the Court of Appeals statement (Opinion, p. 12) that the trial court "found the preponderance [of the evidence] favored the defendants." Again we state that the defendants did not offer any evidence at all to explain the crash of the plane, or to show the use of utmost care, which the law requires of a common carrier, in all respects which could have caused it. Indeed, they stipulated in the Pre-Trial Order that they "are not aware of any facts which reasonably could have caused this accident and intend to offer no evidence tending to show such cause." [V. 1, R. 36-37.]

Petitioner, after being required by the trial court to submit evidence tending to show negligent acts or omissions by defendants that might have caused the crash, offered evidence among other items to show faulty maintenance of the auto-pilot, inadequate pilot training, scheduling of pilots for excessive hours of duty, and lack of test flights after repairs on the plane.

Respondents offered rebuttal evidence as to some of these items, but such rebuttal evidence was of a purely negative character. Most important, Respondent Transocean did not and could not offer evidence tending to explain the cause of the accident, nor establish due care *in all*

possible respects which could have caused it.[4] Transocean admitted that it did not know the cause. [R. 859.] Likewise, it did not know and could offer no evidence that it "acted on the occasion with reasonable skill, and with utmost prudence and caution" (to quote from *Stokes v. Saltonstall*). *There was no evidence of how its pilots acted at and immediately prior to the time of crash.* This lack we believe is fatal to the judgment in its favor. It was just such a lack which led Judge Folta, and the Court of Appeals for the Ninth Circuit in affirming, to give judgment for plaintiff in *Des Marias v. Beckman*, 198 F. 2d 550.

The Court of Appeals was not bound by the District Court's finding that the preponderance of the evidence favored respondents (1) because the finding stemmed from the error of law committed by the trial court in holding at the outset of the trial that the rule of *res ipsa loquitur* did not apply, and (2) because there was no evidence at all to explain the crash of the plane.

The "clearly erroneous" rule (Federal Rules of Civil Procedure, Rule 52(a)) does not preclude review of a finding which stems from an error of law, and the District Court committed an error of law in ruling that the doctrine of *res ipsa loquitur* did not apply to the unexplained crash of the plane.

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[4] Although the Court's opinion (p. 2) states: "Defendants offered evidence to show what they knew of the aircraft's maintenance and operation", none of the evidence referred to pertained to the aircraft's operation at and immediately prior to time of crash.

In *Owen v. Com'l Union Fire Ins. Co. of N. Y.*, 211 F. 2d 488 (C. A. 4, 1954), the Court states (p. 489):

> "* * * The rule that an appellate court will not disturb findings of fact made by the trial judge unless they are clearly erroneous does not apply if he has committed an error of law which has manifestly influenced or controlled his findings of fact, such as a mistake as to the burden of proof. 3 Am. Jur. p. 472; Hall. v. Hall, 41 S. C. 163, 19 S. E. 305, 44 Am. St. Rep. 696; Chase v. Woodruff, 133 Wis. 555, 113 N. W. 973, 126 Am. St. Rep. 972."

The trial court erred in ruling that *res ipsa loquitur* did not apply, and the Court of Appeals erred in holding that it was bound by the trial court's finding which was based on an error of law. There could be no finding based upon evidence exonerating Respondent Transocean in respect to the manner of its operation of the aircraft after its take-off from Wake Island and immediately before the crash, for no evidence was introduced thereon. This record is silent as to what caused the emergency, or how the pilots acted during and immediately before those last awful minutes.

IV.

The District Court Erred in Refusing Petitioner's Timely Request, Before the End of the Trial, to Make a Conclusion of Law as to Whether or Not the Doctrine of Res Ipsa Loquitur Applied Here.

It is obvious that the question whether *res ispa loquitur* applied to the facts of this case was material, indeed vital, to the successful prosecution thereof. We have already set forth the ruling of the trial court that the doctrine was not applicable. (See Appendix B hereto.) In petitioner's objections to the findings of fact and conclusions of law proposed by Respondent Transocean, petitioner requested the Court to make a conclusion of law that the doctrine did, or did not, apply in this case. The Court ignored the request, refused to make the conclusion requested, and signed the conclusions as originally submitted by respondents.

The effect of the trial court's refusal to make the conclusion requested is reflected in the ambiguous language of the Court of Appeals adverted to under Point I. A. and Point II. The effect of the trial court's refusal to give petitioner the benefit of the requested conclusion of law was injurious and prejudicial. Moreover, such refusal is contrary to Rule 52(a) of Federal Rules of Civil Procedure, and violates the basic purpose of said rule, that is, to aid appellate courts by giving them a clear understanding of the basis of the trial court's decision. (See, *Gamewell Co. v. City of Phoenix*, 216 F. 2d 928; *Skelly Oil v. Holloway*, 171 F. 2d 670; *Goodacre v.*

Panagopoulos, 110 F. 2d 716; *Tulsa City Lines v. Mains*, 107 F. 2d 377.)

It has been held that where, as here, the trial court refuses to make a finding or conclusion upon a material question litigated at the trial, such refusal constitutes reversible error. (See *Century Indemnity Co. v. Nelson*, 303 U. S. 213, 58 S. Ct. 531.)

For the reasons hereinabove stated, petitioner respectfully prays that the writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit in order that the erroneous judgment of said Court may be reviewed by this Honorable Court.

Respectfully submitted,

A. J. BLACKMAN,

Attorney for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Joseph M. Trihey, Administrator of the Estate of Maria G. Muna, deceased, *et al.*, Appellant, vs. Transocean Air Lines, Inc., a corporation, *et al.*, Appellees. No. 15,446.

May 5, 1958.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Fee, Chambers and Barnes, Circuit Judges.

Barnes, Circuit Judge:

This is an appeal from a decision of the District Court for the Central District of California in an action in admiralty for the wrongful death of three passengers lost in the crash of an airplane operated by Transocean Air Lines, Inc., a corporation (hereinafter, Transocean), over the Pacific Ocean on July 12, 1953. It arises under the Death on the High Seas Act, 46 U. S. C. §§761-768 (hereinafter, D. H. S. A.). Exclusive jurisdiction is conferred on the admiralty court. 28 U. S. C. §761; Higa v. Transocean Airlines, 9 Cir., 1955, 230 F. 2d 780. The action is against the carrier, Transocean; the maintenance contractor, Slick Airways, Inc., a corporation (hereinafter, Slick); and the manufacturer of the aircraft, Douglas Aircraft Corporation, Inc., a corporation (hereinafter, Douglas).

Plaintiff is the qualified administrator of the estates of Maria G. Muna, deceased; Francisco G. Muna, deceased; and Catalina Manalisay Guiterréz, deceased, and represented their heirs in filing this suit based on negligence. He invoked the doctrine of res ipsa loquitur. The trial judge indicated doubt if the doctrine applied and required plaintiff to present his case in full, *i.e.*, to present all evidence of specific acts of negligence known to him. At the close of

the case, by way of motion for inclusion of a statement of decision and by objections to the findings of fact and conclusions of law, plaintiff sought to obtain a clear ruling or statement from the court, stating whether the court had applied or considered applicable the doctrine of res ipsa loquitur. These several motions were denied and no clear ruling on the point was ever made.

In this case appellant strongly urges (though not exclusively) that the applicability of the doctrine of res ipsa loquitur would cure *all* the defects seen by the trial court in his case. We cannot agree, for under the doctrine of res ipsa loquitur, as expounded by the Supreme Court of the United States, and applicable in admiralty proceedings, while the doctrine of res ipsa loquitur *permits* a verdict for one in appellant's position, its application does not *require* it.

Appellant urges that because respondents offered no evidence to explain the cause of the aircraft plunging into the sea, they are liable. Appellant himself offered no evidence to explain the cause of the crash. He offered evidence to show what *might* have caused it. Defendants offered evidence to show what they knew of the aircraft's maintenance and operation. (Witnesses Carson, Buckalew, Wood, Captain Keating, and Exhibits A to M, inclusive.) The matter then rested with the trial court's conclusion as to where the preponderance of evidence lay. Findings of fact adverse to appellant, supported by conflicting evidence, were filed, as well as appropriate conclusions of law favoring all defendants. We are asked to reverse, as a matter of law.

Plaintiff's points on appeal are these:

1. Res ipsa loquitur should have been applied by the trier of fact.

2. If res ipsa loquitur was applied, it was sufficient as a matter of law for plaintiff to have judgment.

3. Even without res ipsa loquitur the clear preponderance of the evidence requires a judgment for plaintiff.

4. Errors in findings.

5. Error in failure to award plaintiffs value of baggage lost and fares paid by decedents.

Most of the "facts" are uncontradicted, but there is a substantial conflict as to their interpretation on the issue of negligence.

The plane involved was on a flight from Guam to Oakland via Wake Island and Hawaii. It crashed without radio warning of trouble approximately one hundred miles east of Wake Island about fifteen minutes after take-off. Bits of the plane and fourteen unidentified bodies were recovered from the ocean.

Plaintiff introduced much evidence of alleged deviations from Civil Air Regulations, the manuals of the carrier, and approved maintenance procedures; evidence of maximum use of the plane by the carrier from purchase of the time of the crash; alleged fatigued condition of the crew (out of forty-two hours from take-off the crew spent twenty-eight hours on duty, twenty-two hours aloft, and thirteen hours off duty—at Guam); evidence of allegedly faulty maintenance of the automatic pilot (—plaintiff strongly implies this was the cause of the crash—) and of No. 4 engine; and alleged poor qualifications of one of the co-pilots.

Slick was the original owner of the plane, but had sold it to Transocean in 1952. Slick was the maintenance contractor for the aircraft and had done its last maintenance work approximately three weeks before the crash. There was evidence of Slick's allegedly faulty maintenance and testing of the plane in various particulars.

As to Douglas there was no evidence introduced.

Applicability of Res Ipsa Loquitur.

We agree that res ipsa loquitur is applicable to certain aircraft crash cases. We are unable to determine from the record whether or not the trial judge applied the doctrine in this case. He originally felt it did not apply; he required the appellants to produce their evidence as to defendant's alleged negligence; he stated the applicability of the doctrine was "still open for consideration at a later date"; he permitted counsel to argue its applicability on final argument and to cite cases at final argument in support of its applicability. The court then gave judgment for defendants without disclosing whether or not he considered res ipsa loquitur applicable.

But whether or not the court applied the doctrine is not controlling on this appeal. This because, were it applied, the trial court was yet required to weigh all the evidence produced. This the court did and made findings adverse to appellants in respect to each defendant's negligence (Findings XXXIII, XXXIV, XXXV); in respect to the airworthiness of the plane and in respect to its maintenance (Findings XXXVI, XXXVII); in respect to the certification of the plane, and the fatigue of the crew (Findings XXIII, XXV, XXVI).

In other words, even if res ipsa loquitur should have been applied by the trier of fact, and was not, the application of that doctrine alone to the facts of this case is not sufficient to require a judgment as a matter of law for plaintiffs. And we cannot agree that either with or without res ipsa loquitur we are required to rule that the clear preponderance of the evidence, as a matter of law, requires a judgment for plaintiffs. The rule followed at one time that trial *de novo* exists in admiralty appeals is no longer the law. McAllister v. United States, 1954, 348 U. S. 19; Western Canada Steamship Co. v. United States, 9 Cir., 1957, 245 F. 2d 921, n. 2.

We have seen that an action under the "Death on the High Seas" Act is exclusively triable on the admiralty side of the court. Higa v. Transocean Airlines, *supra*.

Does res ipsa loquitur apply in admiralty cases? The Supreme Court has at least impliedly so ruled in a case in admiralty where res ipsa loquitur was expressly applied without discussion of its possible inapplicability. Johnson v. United States, 1949, 333 U. S. 46, reversing 160 F. 2d 789. In that case, the Supreme Court granted certiorari and reversed this Court "because of the seeming misapplication by the court below of Jesionowski v. Boston & Maine RR Co., 329 U. S. 452." *Id.* p. 47.[1]

Applying the Jesionowski rule to the facts of the instant case, we first ask, were the persons whose heirs are here suing without fault? There is no evidence one way or another. We know that passengers have become crazed or drunken and attempted to wrest control of airplanes from pilots. We know that individuals have attempted

[1]This Court referred to the Jesionowski case twice in Johnson. We first said:

"The Supreme Court in Jesionowski . . . laid down the rule that courts are not to apply a 'conceptualistic interpretation' or res ipsa loquitur, and that an examination of the facts and circumstances of a particular case should be made. The Supreme Court said: 'The question here really is . . . whether the circumstances were such as to justify a finding that this derailment was a result of defendant's negligence . . . .'

We think the circumstances of this (Johnson) case are not 'such as to justify a finding that this [accident] was a result of [appellant's] negligence.'" (p. 793.)

We later said:

"We do not think that the falling of a block during a 'rounding in' operation is an accident which is 'ordinarily the result of negligence' such as a derailment in the Jesionowski case, *supra*." (p. 794.)

Mr. Justice Douglas, in discussing Jesionowski in the Johnson case, said:

"The rule of *res ipsa loquitur* applied in Jesionowski v. Boston & Maine R. Co., *supra*, means that the facts of the occurrence

suicide from airplanes and endeavored to take all occupants with them to their death. All this is possible, but certainly not probable. Nor can we presume any such interference in this case. The presumption of the exercise of due care for one's own safety, if it applies to pilots and engineers of airplanes, should with equal or greater cogency apply to passengers. In the absence of all evidence as to conduct, we presume due care was exercised by all passengers.

We next ask, (if we assume the passengers were exercising due care for their own safety, and were therefore without fault, and died as a result of a plane disappearing without warning into the sea) whether there is the basis for a fair inference that, to paraphrase Jesionowski, "the man who dropped the plane" was negligent. If we knew that it was the *pilot* who caused the plane to dive into the sea, we think that such an inference of negligence would be a fair one. But apparently no one knows if there was pilot failure, or any human failure, connected with, or that proximately caused, the accident.

This court has applied res ipsa loquitur to a case involving the unexplained loss of an aircraft at sea. Haasman v. Pacific Alaska Air Express, D. Alaska, 1951, 100 F. Supp. 1, affirmed *sub nom.* Des Marais v. Beckman,

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warrant the inference of negligence, not that they compel such an inference.' Sweeney v. Erving, 228 U. S. 233, 240. . . . [W]here as here, the injured person is not implicated, [citing Jesionowski] the falling of the block is alone sufficient basis for an inference that the man who held the block was negligent. * * *

No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events. . . . The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis for a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act." (pp. 48, 49, 50.)

1952, 198 F. 2d 550. There this Court approved the following language:

"The question presented, therefore, is whether the doctrine of res ipsa loquitur applies where the plane disappears during flight without a trace. The defendant's contention that the doctrine is not applicable to a case such as this is based primarily on the ground that since the plane disappeared without a trace, the defendant can have no knowledge of the cause of the loss of the plane superior to that possessed by the plaintiffs.

The rule precluding the application of the doctrine where the plaintiff's knowledge is equal to that of the defendant is stated in 65 C. J. S., Negligence, §220(5), page 1000 and 38 Am. Juris. 995, Section 209. An examination of the authorities cited in support of the rule however, discloses that it is applied to cases where the plaintiff has equal knowledge or where knowledge of the cause is equally accessible to the plaintiff—not to cases in which there is an equality of ignorance as in the instant case. Since inability, because of a lack of knowledge, to show specific acts of negligence is a prerquisite to the application of the doctrine itself, it follows that equality of knowledge precludes its application. But from this it does not follow that conversely equality of ignorance will likewise preclude applicability, for the function of the doctrine, as stated in the introduction to Shain's Res Ipsa loquitur, is to supply a fact, *i.e.*, defendant's negligence, which must have existed in the causal chain stretching from the act or omission by the defendant to the injury suffered by the plaintiff, but which the plaintiff because of circumstances surrounding the causal chain, cannot know and cannot prove to have actually existed. I conclude, therefore, that the rule

barring the application of the doctrine where there is equality of knowledge is not applicable to the case at bar. *Cf.* Weller v. Worstall, 50 Ohio App. 11, 197 N. E. 410, 413.

Defendant also contends that it did not have exclusive control of the plane because of the requirements prescribed by the regulations of the Civil Aeronautics Board, in consequence of which, it is asserted, some measure of control was in the Board. This is merely confounding control of the plane with regulation by public authority. *Cf.* Parker v. James E. Granger, Inc., 4 Cal. 2d 668, 52 P. 2d 226.

I am of the opinion that the doctrine of res ipsa loquitur is applicable and that the motion to dismiss should be denied. Seaman v. Curtiss Flying Service, 231 App. Div. 867, 247 N. Y. S. 251; Smith v. Pacific Alaska Airways, 9 Cir., 89 F. 2d 253; Pacific Alaska Airways v. Mahan, 9 Cir., 89 F. 2d 255. Judgment may accordingly be entered for the plaintiffs." 100 F. Supp., at 2.

Judge Folta cited in support of the applicability of the doctrine Seaman v. Curtiss Flying Service, 1930, 247 N. Y. S. 251; Smith v. Pacific Alaska Airways, 9 Cir., 1937, 89 F. 2d 253; and Pacific Alaska Airways v. Mahan, 9 Cir., 1937, 89 F. 2d 255.

The last two cases above were apparently not filed in admiralty, inasmuch as the earlier cases did not read the D.H.S.A. as conferring exclusive jurisdiction in admiralty. (Powers v. Cunard SS. Co., S. D. N. Y., 1933, 32 F. 2d 720.) In the Smith case, where plaintiff proved the plane crashed and then rested, Judge Wilbur assumed without discussion that *res ipsa loquitur* applied, and that the applicable rule as to *res ipsa* appears in Gleeson v. Virginia Midland RR Co., 1891, 140 U. S. 435 and Sweeney v.

Erving, 1913, 228 U. S. 233, 240. In Pacific Alaska Airways v. Mahan, *supra*, no question of *res ipsa loquitur* was discussed. In Seaman v. Curtis Flying Service, *supra*, there is the bare holding that *res ipsa loquitur* applies to an unexplained aircraft crash which resulted in the death of a passenger.

Earlier cases, such as Smith v. Pennsylvania Central Airlines Corporation, D. D. C., 1948, 76 F. Supp. 940, hold *res ipsa loquitur* applicable to aircraft crashes over land, but observe that the rule "has never been applied to loss of life at sea." *Id.*, 943. We may accept Judge Holtzoff's conclusion as of 1948, but since then, as we have seen, the doctrine has been applied at least by this Court of Appeals to loss of life at sea. The doctrine having as "its first requirement . . . (the) basis of past experience"[2] is peculiarly one of growth ordered by quantitative experiences of mankind.

It would do little good to review the various aircrash cases many of which hold the doctrine applicable and many of which do not.[3]

In view of our conclusions hereinafter expressed, we need not meet the issue as to whether or not *res ipsa loquitur* is applicable to any and all aircrashes; whether applicable to aircrashes on land or in waters within territorial limits, where the doctrine is generally applicable, and not over waters outside the territorial limits of such lands; whether applicable to some aircraft crashes under the particular facts known about them and not to other aircraft crashes occurring under differing factual situations. We have heretofore held *res ipsa loquitur* applicable

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[2]Prosser "Res Ipsa Loquitur in California," 37 Calif. L. Rev. 183, 191.

[3]See Goldin, "The Doctrine of Res Ipsa Loquitur in Aviation Law," 18 So. Cal. L. Rev. 15, 124.

to suits on the admiralty side in certain cases, and we see no reason to change that rule.[4]

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[4]Johnson v. U. S., 9 Cir., 1947, 160 F. 2d 729 reversed on other grounds, 1949, 333 U. S. 46. Judge Holtzoff's analysis in Smith v. Pennsylvania Central Airlines Corp., *supra*, is worthy of note:

"The progress of aviation has been rapid. In the course of comparatively few years, it has reached a point at which a host of transport airplanes flying according to fixed schedules over a network of permanent routes, carry thousands of passengers annually. Airplane lines vigorously compete with railroads and steamships. Those responsible for the remarkable and swift growth and development of aviation can justifiably boast of a superb record of unparalleled and rapid achievement and success. Accomplishment must be accompanied by responsibility. No reason is discernible why the principles that govern the liability of other common carriers, such as railroads, should not be equally applicable to transport airplanes operating as common carriers.

The majority of reported cases have reached the conclusion that the rule of res ipsa loquitur is applicable to accidents occurring on airplanes operated as common carriers. Thus, in Smith v. O'Donnell, 215 Cal. 714, 719, 12 P. 2d 933, 935, it was stated: 'There can be no doubt, under the general law of common carriers as we have found it, that those airlines which are engaged in the passenger service on regular schedules on definite routes fall within the classification. The industry itself should be desirous of assuring the public that those who accept their invitation to travel by air will be accorded that protection which may be afforded by the exercise of "the utmost care and diligence for their safe carriage." . . . It may safely be asserted that there is no mode of transportation where the passenger's safety is so completely entrusted to the care and skill of the carrier.'

The following cases hold to the same effect: Genero v. Ewing, 176 Wash. 78, 28 P. 2d 116; Smith v. Pacific-Alaska Airway, 9 Cir., 89 F. 2d 253; Seaman v. Curtiss Flying Service, 231 N. Y. App. Div. 867, 247 N. Y. S. 251.

In England the same view has been expressed and applied. Thus in Fosbroke-Hobbes v. Airwork, Ltd., 1 All. E. R. 108 (1937); 1 Avi. 663, 664, is found the following illuminating discussion: 'It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world, and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a common-place method of travel, supplementing, though not superseding, rail and sea transport. Railways were just as great an innovation when they took the place of the stage coach, yet

But as much difficulty is caused by the various definitions of what the rule is and what it does, as by the question as to whether is should or can be used.

Around the casual words of Baron Pollock during legal argument there has evolved a legal doctrine that has been severely criticized.[5]

Mr. Justice Groner of the United States Court of Appeals for the District of Columbia has given a quick summary of the problem (described by others as a lucid

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the courts found no difficulty in applying to them by the year 1844 the same doctrine that had formerly been applied to stage coaches."

The same result has been reached by the courts of Ontario and Manitoba, Malone v. Trans-Canada Airlines, Ontario, 1 Avi. 1028, 1030; McInnery v. McDougall, 47 Manitoba 119, 1 Avi. 718; Galer v. Wings, 47 Manitoba 281, 1 Avi. 778, 782.

There are a number of decisions in which the courts have declined to apply the doctrine of res ipsa loquitur to airplane accidents: Morrison v. LeTourneau Co., 5 Cir., 138 F. 2d 339; Cohn v. United States Air Lines Transfer Corporation, D. Wyo., 47 F. Supp. 865; Herndon v. Gregory, 1935, 190 Ark. 702, 81 S. W. 2d 849, 82 S. W. 2d 244; Wilson v. Colonial Air Transport Inc., 1932, 278 Mass. 420, 180 N. E. 212, 83 A. L. R. 329; Smith v. Whitley, 223 N. C. 534, 27 S. E. 2d 442; Boulineaux v. City of Knoxville, 20 Tenn. App. 404, 99 S. W. 2d 557; Budgett v. Soo Sky Ways, 64 S. D. 243, 266 S. W. 253.

With the exception of Smith v. Whitley, *supra*, none of these cases, however, involved a common carrier. In each instance, the plane was either a private plane or was on a test flight. In Smith v. Whitley, *supra*, it did not appear whether the airplane was a common or private carrier.

The foregoing considerations inescapably lead to the conclusion that the doctrine of res ipsa loquitur should be deemed applicable to accidents involving airplanes operating as common carriers." 76 F. Supp. at 495.

[5]See Morris, "Res Ipsa Loquitur—Liability Without Fault," 25 Ins. Counsel Journal 97, quoting: "It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule." Dissenting opinion of Bond, C. J., Potomac Edison Co. v. Johnson, 152 Atl. 633, 636 (Md. 1930).

explanation) in Capital Transit v. Jackson, 1945, 149 F. 2d 839, 841:

> "Some of the decisions hold that a 'presumption' arises, some a 'permissible inference,' other a 'prima facie case,' and in still others that the burden of proof is shifted to the defendant. The confusion is added to by the continued use of the words *res ipsa loquitur* to describe all of these rules without distinguishing among them. But whatever the result of the application of the rule in other jurisdictions, in the District of Columbia the rule is that, when *res ipsa* is applicable, it permits an inference of negligence and thus establishes a prima facie case, or, in other words, makes a case to be decided by a jury. But it does not shift the burden of the proof. When all the evidence is in, the question for the jury still is whether the preponderance is with the plaintiff."

This view of what *res ipsa loquitur* is, and what it does, follow the Supreme Court definition. Sweeney v. Erving, *supra*, ". . . . cut through the mass of verbiage built up around the doctrine of res ipsa loquitur." Jesionowski v. Boston & Maine RR Co., *supra* at 457. "The rule deals only with permissible inferences from unexplained events." Johnson v. United States, *supra* at 49. "When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff." Sweeney v. Erving, *supra* at 240.

In the instant case there was no jury. The trier of facts was the trial judge. Whether or not he considered the doctrine of *res ipsa loquitur* helpful and therefore applied it, we do not know, but whether he did or did not, he heard the evidence produced by each side and found the preponderance favored the defendants. We cannot say as a matter of law that had the rule been relevant and

applicable here it could by itself require or sustain a verdict for plaintiff.

The facts of an unexplained crash into the ocean may warrant an inference of negligence, but do not compel that inference.[6] Nor can we try the case *de novo*. Our duty is to see that the trial court's conclusion as to the facts was not clearly erroneous. Fed. R. Civ. P. 52(a). We are satisfied here that it was not clearly erroneous.

We do not meet the problem of whether the essential of exclusive control of the instrumentality involved was proved to the satisfaction of the trial court,[7] nor whether the airline operator can by the use of independent contractors delegate his duty of adequate maintenance of the plane. *Cf.* De Vito v. United States, Inc., E. D. N. Y., 1951, 98 F. Supp. 88.

What we have said above disposes of appellant's fourth point, that the District Court erred in various findings. We come to appellant's fifth and last claimed error, the failure of the trial court to make findings disposing of appellant's claims for loss of baggage and refund of fares paid.

Appellant urges that only one cause of action exists for *all* pecuniary loss, which includes cost of transportation paid and the value of baggage lost. Appellees urge that

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[6] *Cf.* Danner v. Atkins, 1956, 47 Cal. 2d 327, 303 P. 2d 724; Druzanick v. Criley, 1942, 19 Cal. 2d 439, 444, 122 P. 2d 53, 55.

[7] Prosser, Torts 43 (2 ed. 1955).

"Negligence may be proved by circumstantial evidence. One type of circumstantial evidence to which the courts have given the name res ipsa loquitur, arises where

(a) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence, and

(b) it is caused by an instrumentality within the exclusive control of the defendant, and

(c) the possibility of contributing conduct which would make the plaintiff (patient) responsible is eliminated."

this is solely a death statute and the pecuniary loss must be sustained by the persons for whose benefit the suit is brought. Appellant cites no cases; appellees but one, denying recovery of funeral expenses (The Culberson, 3 Cir., 1932, 61 F. 2d 194). The right of plaintiff to sue here depends on statute. The statutory right is for the benefit of those named by statute—wife, husband, minor child, or dependent relative. These may or may not be the beneficiaries of decedent's estate. Any recovery of fare paid, or baggage lost, would inure only to the benefit of decedent's estate—not necessarily to those whom the statute specifies. We find no cases directly in point. Were it essential in this case, we could conclude that the personal representative, suing only under the D.H.S.A., has no cause of action for funeral expenses, fare paid, or baggage lost. But in view of the lower court's finding of no liability, which we do not disturb, the failure to find on this issue cannot be substantial or prejudicial error.

We have considered above the liability of the carrier, Transocean Air Lines, Inc. In considering the liability of Slick, we meet head on the issue touched upon above (see note 7)—"exclusive control," and the divided responsibility of Slick Airways, Inc. and Transocean for the proper maintenance of the plane. There seems little question but that on this record we could not hold as a matter of law that Slick had exclusive control over the plane so as to render *res ipsa loquitur* applicable. To consider holding Slick liable would at least require some proof that a failure to maintain the plane in proper mechanical condition was a proximate cause of the crash. This factual issue has been decided by the trial court adversely to appellant.

In considering whether the trial court was "clearly erroneous" in the conclusions to which it came upon weighing all the evidence, we must keep in mind that every

inference and intendment favors the position of appellees. We cannot re-examine or re-weigh the evidence, but this is what appellant would have us do with respect to the disputed matters of pilot training, pilot fatigue, and, most particularly, auto pilot maintenance and malfunction.

Finally, we are asked to find the manufacturer of the plane, Douglas Aircraft Corporation, Inc., liable. This position is not seriously urged by appellant. The trier of fact found no negligence existed on the part of Douglas, and we agree there was none.

The judgment is *affirmed* as to all defendants.

(Endorsed.) Opinion. Filed May 5, 1958.

As amended by order of July 14, 1958.

Paul P. O'Brien, Clerk.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Joseph M. Trihey, Administrator of the Estate of Marcia G. Muna, deceased, *et al.*, Appellants, vs. Transocean Air Lines, Inc., a corporation, *et al.*, Appellees. No. 15446.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered May 5, 1958.

PAUL P. O'BRIEN, Clerk.

APPENDIX B.

The proceedings at trial, ending with the Court's ruling that the doctrine of *res ipsa* did not apply, have been extracted from the Record, as follows:

(Friday, April 13, 1956)

"Mr. Blackman: . . . So I would respectfully ask the Court, if it would, to see whether or not it will give us an answer to those questions of law that are contained in the pre-trial order, at least, so that we know just how far our proof should extend at this time.

"The Court: Well, I just had in mind your proceeding at this time, Mr. Blackman—in other words, calling your witnesses. We will take care of that as we go along, and not make any decision on that right now.

"Mr. Blackman: I see.

"The Court: I will work on it some on the week end or sometime, but I have been trying this case and I thought maybe we could go ahead and I could work on it during the week end.

"Mr. Blackman: Fine, your Honor.

"Mr. Tilson: I can assure your Honor that we have no idea of conceding that res ipsa applies in this particular case, which, of course, is on the admiralty side and brought under a specific statute which was not in any manner involved in the cases cited. So that I think before we get through we will be going ahead with all of it anyway.

"The Court: We'll just proceed with the case.

"Mr. Tilson: Yes, just go ahead with the trial.

"The Court: Well, we'll do it that way. The Court has made its statement, Mr. Tilson spoke, and I take it Mr. Kearney and the rest of you go along with Mr. Tilson's statement on that?

"Mr. Kearney: Yes, your Honor, although I think, as far as Douglas Aircraft Company is concerned, the plaintiff does not claim that the doctrine of res ipsa loquitur would in any event apply. Isn't that true, Mr. Blackman?

"Mr. Blackman: I think that's a fair statement, yes.

"Mr. Boxx: On behalf of defendant Slick, we certainly strenuously contend that it does not apply to the defendant Slick.

"The Court: All right. Well, you might as well proceed then."

* * * * * * *

(Tuesday, April 17, 1956)

"Mr. Blackman: One other matter, if I may inquire of the Court whether or not the Court has come to any conclusion concerning this question of the applicability of res ipsa loquitur.

"The Court: Well, I felt that it didn't apply. Just go ahead with your case.

"Mr. Blackman: I see. Is that an indication that the Court has on the basis of the evidence that has been submitted so far?

"The Court: Oh, no. I had to make a ruling the other day when you brought that question up.

"Mr. Blackman: Yes.

"The Court: I said that if I ruled on that it would shorten the case, and I said I felt it didn't apply. So we will proceed with the trial.

"Mr. Blackman: Is the question still open for further consideration at a later date?

"The Court: Yes, certainly.

"Mr. Blackman: I see.

"The Court: I didn't ask to hear from defense counsel because I thought you wouldn't quarrel with the Court's ruling.

"Mr. Tilson: No, indeed.

"Mr. West: No quarrel, your Honor.

"Mr. Foxx: No quarrel.

"The Court: All right."

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Office-Supreme Court, U.S.
FILED
SEP 12 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957
No. 284

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. MUNA, deceased, *et al.*,

Petitioner,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. .....

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. MUNA, deceased, *et al.*,

Petitioner.

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

I.

The Questions Presented by Petitioner Have Been Fully and Completely Disposed of by the Court of Appeals in Conformity With the Decisions of This Court, Particularly the Case of Sweeney v. Erving, 228 U. S. 233, 33 S. Ct. 416; 57 L. Ed. 815.

Each and every one of the so-called questions presented is grounded upon a false and illusory premise, to wit that the trial court did not give to the petitioner the benefit of the doctrine of *res ipsa loquitur*. Although the trial court at the inception of the trial suggested that the doctrine *res ispa loquitur* did not apply to the case, the

transcript demonstrates, as the Court of Appeals has indicated in its opinion, that the matter was left *open* by the trial court for future comment and discussion and the record reveals without question that the applicability of the doctrine was fully presented and argued by petitioner's counsel in his final argument to the court, and that authorities were given on the subject by counsel to the court prior to the rendition of its decision. The Court of Appeals, in conformity with the decisions of this Honorable Court, held that the evidence, including any inference or presumption created by the doctrine of *res ipsa loquitur*, presented a question of fact for the trial court, and when the evidence was all in, the question for the trier of fact was whether the preponderance was with the plaintiff.

Sweeney v. Erving, 228 U. S. 233, at 240 (*supra*).

The case is a simple one and presents no new or novel questions to be decided by this court, does not involve any conflict between decisions of this Court or the Circuit Courts nor does it involve any question of public importance and falls into the category of cases which this court has long since refused to review.

II.

Petitioner's Statement of Facts Is Inadequate and Inaccurate.

Petitioner has set forth what is entitled a "Summary Statement". A few of the many inaccuracies will be pointed out, together with additional material which was before the trial court and of which no mention is made by petitioner.

It is asserted that the trial court ruled that *res ipsa loquitur* did not apply in admiralty. (Pet. p. 5.) This

statement is inaccurate. The actual remarks of the court in no manner suggested the degree of finality urged by petitioner.[1] Nor is there anything in the record to indicate in the court's mind any distinction between the application of *res ipsa loquitur* in admiralty as opposed to common law courts.

Not only did the trial court indicate at the outset that the question of the applicability of *res ipsa loquitur* was still open for consideration at a later date, but petitioner's counsel fully argued *res ipsa loquitur* in both his arguments to the court. See particularly the closing argument, pages 882-888, wherein counsel cited a New York case relating to the application of the doctrine (p. 888) and handed the volume to the court (p. 919). The record reveals that at the time of the submission of the case the court retained the volume of the New York Reports which counsel had handed to him.

It was conceded by respondents that they did not know the cause of the fatal crash. It must be obvious that with a crash occurring approximately 340 miles east of Wake Island, with no survivors, and no eye witnesses, it would have been virtually impossible for respondent Transocean Airlines, Inc. to have submitted any evidence as to the actual cause of the crash. Petitioner's statement that respondents offered no evidence to "show proper care in all respects required of them" is inaccurate. A mass of evi-

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[1] The court stated as follows:

"The Court: I said that if I ruled on that, it would shorten the case, and I said I felt it didn't apply, so we will proceed with the trial.

Mr. Blackman: Is the question of the applicability of res ipsa loquitur *still open for consideration at a later date?*

The Court: Yes, certainly.

Mr. Blackman: I see" [p. 90].

dence was offered to show proper operation and maintenance, plus the presumption of due care on the part of the deceased pilots and crew.

Respondent Transocean Airlines, Inc. conducted a large operation, with principal bases in Oakland and Burbank, California, and with bases in Honolulu, Guam and Wake Island, as well as Tokyo and other points in the Orient.

In July, 1953, the month of the fateful crash, Transocean maintained facilities at Oakland, where they had 10 electricians, including 4 instrument men, as well as numerous mechanics [pp. 208-209]. They were equipped to make complete changes, work on automatic pilots and to do any other necessary maintenance work.

Facilities at Burbank were maintained by respondent Slick, the latter company being paid $33,000.00 a month for maintaining the airplane in question [p. 45]. Slick's facilities had been thoroughly investigated and found adequate. Their library contained all the necessary manuals relating to the maintenance of the aircraft [p. 764].

Transocean maintained in addition, bases at Honolulu, where the personnel was approximately 25 persons, at Wake Island, where the personnel was 75 to 80 persons, and at Guam, where the personnel was 15 to 20 persons; in each instance mechanics and other qualified persons being a part of the personnel capable of making engine changes, tire changes, replacing or working on the automatic pilot, and any other portion of the airplane [p. 726].

The aircraft was a Douglas DC-6 purchased from Slick, which was converted by Douglas from a cargo plane to a passenger plane. It was a type of plane customarily used throughout the world for the carriage of passengers and freight.

As a part of normal operating procedure in both Service and commercial flying, it is customary for the pilots to indicate in the ship's log any discrepancies that need correcting. These are termed in the industry, "squawks." *Everything* is put down, whether it is a broken light bulb or something really serious [p. 683].

Petitioners evidence showed a history of squawks relating to the automatic pilot. The evidence is undisputed however that on June 2, 1953, the automatic pilot was removed from the plane at Oakland by witness Babb and *completely overhauled*. Prior to October of 1953 the Civil Aeronautics Authority had not issued a repairman's certificate. As soon as they came out, however, in October, this man received such a certificate. Babb was amply qualified. He had been working on automatic pilots of the same type as were installed in the aircraft in question, since 1947 [p. 202].

He had received training in a trade school, at the Iowa State College for the Navy, had attended the gyro compass school for the Navy, the DC-6 school and the Slick Airways School [p. 197], in addition to a Navy instructor's school. He had schooling from a Bendix representative on the auto pilot [p. 198]. On June 2, this witness worked on the auto pilot and overhauled the altitude control unit [p. 239]. He discovered that the autyson rotor bearings were frozen. These bearings were replaced and the system checked and found to be satisfactory. The unit was reinstalled in the airplane and checked in the plane [p. 240]. This particular autyson was standard and was used in many similar instruments and the witness was thoroughly familiar with its overhauling [p. 242]. He tested the altitude control as prescribed in the overhaul manual [p. 242] and subjected it to various tests.

He tested the altitude control in the airplane and it worked satisfactorily. He was of the opinion that if there was any other component that was not working, it would have shown up in the operation of the auto-pilot [p. 250]. He checked out the overpowering mechanism and determined that the auto-pilot could be manually overpowered without excessive pressure, and that it did not overpower too easily; in other words, that there was sufficient control [p. 278]. This work was likewise checked out by witness George Shaw, an inspector with Transocean, who had a background of training at Cal Aero Tech and the Navy [p. 322]. It was the witness' opinion that the overhaul which had been done by Babb had corrected any trouble in the instrument [p. 335]. He observed the mechanic put the system through its ground run [p. 338]. *There is no record of any further squawk by any of the pilots with reference to the auto-pilot following the overhaul of June 2.*

During the month of July 1953, the airplane was flown on July 2nd from Oakland to Burbank, on July 4 from Burbank to Oakland, and then to Honolulu. On July 5 from Honolulu to Wake Island, and then to Tokyo, with a return trip to Wake Island on July 6. On July 6 the plane was flown to Honolulu and then to Oakland, where it arrived on the 7th, after which it was flown to Burbank. On July 8, the plane was flown from Burbank to Oakland and then on July 9 to Honolulu, where on the same day it returned to Burbank. On July 10, the plane was flown from Burbank to Oakland, from Oakland to Honolulu, and on July 11 to Guam and then on July 12 to Wake Island, where, en route to Honolulu, the plane disappeared.

It is significant to note that during the entire month of July, although there were minor squawks of various

type with reference to the plane, which were corrected, not one single mention appears of any malfunctioning of the auto-pilot or any of its component parts.

Captain Keating flew the plane during the fore-part of July and had used the automatic pilot and had experienced no difficulty with it [p. 728]. Captain Buckelew, an experienced flier, flew the plane on July 10, 1953, from Oakland to Honolulu, a flight of 10 hours and 5 minutes [p. 675]. He did not recall any difficulty in connection with the operation of the plane on that trip [p. 677]. Buckelew testified that if there had been anything unairworthy about the craft he would have so stated to Captain Word [p. 685]. There is no evidence to indicate that any of the pilots on the trip from Oakland to Honolulu, from Honolulu to Guam or from Guam to Wake Island, had any problem whatsoever with the automatic pilot. From this evidence alone, the trial court could reasonably conclude that Babb's overhaul had eliminated any problem with the automatic pilot.

The evidence is uncontradicted that on July 10, 1953, the plane departed from Oakland Airport for Honolulu, the flight being designated as No. 109. This flight was in charge of Captain Buckelew, an experienced pilot and a good friend of Captain Word, the pilot on the fatal flight. Captain Buckelew flew the plane to Honolulu, where it was taken over by Captain Wm. L. Word, First Officer Herbert A. Hudson, Second Officer Leonard H. Nowell, Navigator John Hoy, Flight Engineer George Haaskamp, Student Flight Engineer Paul Yedwabnick, a flight purser and a stewardess. All these persons were well known to Captain Buckelew [pp. 670-672]. In the opinion of the witness, Captain Word and the members of the crew appeared to be fresh. In his opinion at the time the air-

craft was turned over to Word, it was in an airworthy condition [p. 685]. This was the crew on duty at the time of the fatal flight.

The evidence was uncontradicted that all three of the pilots were experienced pilots. While the total flying time of none of these men is reflected in the record, it is obvious that even in DC-6 equipment alone, their flying experience had been considerable. Thus, Captain Word had DC-6 flight time of 712 hours; Officer Hudson had 529 hours in DC-6 equipment, and Officer Nowell had 699 hours in DC-6 equipment.

Captain Word was described by one witness as being a very good pilot—conservative, knew his business [p. 677]. Captain Keating testified that Word and Hudson were excellent pilots [p. 732]; that Officer Nowell was a good pilot [p. 736]; that Flight Engineer Haaskamp was an excellent flight engineer. He was described as being above average.

The flight from Honolulu to Guam was uneventful. Don Carson, the dispatcher at Guam on July 11, actually observed the plane land [p. 629]. The passengers were helped off the aircraft and the witness talked to the crew [p. 632]. The flight logs and the weather were discussed with the members of the crew. No complaints of any kind were made with reference to the functioning of the aircraft.

The crew was in good spirits and none appeared to be ill [p. 634], and none appeared to be suffering from pilot fatigue [p. 634]. The crew was taken in two vehicles to the Transocean headquarters in the mountains. They were fed and after a brief "bull session" the crew broke up and went to bed. The following morning the crew

was awakened and driven to the airport. Everyone looked normal and rested and nobody appeared tired [p. 640]. The crew went to the office and the witness was in contact with all members of the crew and observed their physical condition during a period of approximately an hour and a half before the flight. He noticed nothing unusual about their physical condition [p. 641]. He was a very good friend of all members of the crew. The plane was put through a pre-flight check and sounded satisfactory. He observed the take-off and noticed nothing unusual about the take-off or the attitude of the plane [p. 646].

A short time later the plane landed at Wake Island.

Harry Wood, a mechanic employed by Transocean at Wake Island, and whose duty it was to service and maintain the aircraft, observed the plane land at Wake Island [p. 699]. He checked immediately with the flight engineer and Captain Word and there were no complaints with reference to the plane [p. 702]. He went over the matter of possible discrepancies with the flight engineer, Haaskamp, and was advised that there was no malfunctioning or discrepancies in the aircraft. In checking the log, Wood did not observe any squawks or complaints other than the left main inboard tire, which showed some signs of wear [pp. 705-706]. The evidence was uncontradicted that a worn tire would have no bearing of any type upon the airworthiness of the plane [p. 705]. The ground checks made of the plane before its departure were satisfactory [p. 709]. He fully and completely checked the airplane before departure [pp. 703-704].

While much of petitioner's evidence was devoted to a long excursion into the voluminous records relating to the particular plane; going back for a period of days,

weeks, months and even years before the accident in question, the fact remains that the plane was constantly serviced by both Slick and Transocean and that the arrival at Guam was *uneventful* as well as the departure from Guam and the arrival at Wake Island. At the time of the departure from Wake Island, the crew appeared to be in good spirits. There is no evidence of any problem on the flight between Guam and Wake Island, nor is there any evidence of any problem developing after the take off at Wake Island, during which time position reports were given on two occasions.

At Wake Island, several of the ground crew were deeply conscious of the departure of this particular plane since it contained at least a dozen members of families departing from the Island, with whom they were thoroughly familiar, as well as the crew, who were good friends of the witnesses that testified. It is fair to infer that none of the ground crew, faced with the obligation of correcting any known flaws in the plane, would have permitted this particular plane under these circumstances to have departed without taking every possible precaution.

The crew in question boarded the airplane in Honolulu and flew to Guam where they were taken from the air field in two automobiles to quarters where they were appropriately fed. The uncontradicted evidence is that they had ample rest and opportunity for rest and that the following morning, the day of the fateful flight, they had breakfast, and that at that time they appeared to be rested and there was no evidence of any fatigue [p. 638]. This testimony came from persons who were experienced in the observation of pilots and persons engaged in the flying of aircraft and who would clearly be in a posi-

tion to know about fatigue and the effects of fatigue on an individual.

Some of the evidence relating to the auto-pilot has already been referred to. There is no evidence indicating that in fact the auto-pilot was in use at the time of the disappearance of the plane. Its use is *optional* with the pilot, who may or may not see fit to use the instrumentality. In any event, the plane had been flown from Honolulu to Guam to Wake Island with no evidence of any problem in connection with the auto-pilot. At the time of the last radio check in, there was no mention of any difficulty with the auto-pilot. Respondent's employees are of course entitled to the presumption that they take ordinary care for their own concerns and that they obey the law, and it must therefore be presumed that if there had been any difficulty with the auto-pilot as a result of the long flight from Honolulu to Guam, or from Guam to Wake Island, the crew would have called attention of this fact to the ground crew at either Guam or Wake Island, so that the needed repairs could be made. There is no evidence of any such request.

It is quite obvious that at the time of the last report, the plane had just reached its cruising altitude. What the pilot did with reference to the auto-pilot at that point is of course pure speculation. The evidence is uncontradicted in any event that there are at least four methods by which the pilot or co-pilot may disengage the auto-pilot. See testimony of Buckelew [p. 680]; testimony of Keating [pp. 729-730]. Babb testified that there were four ways in which the auto-pilot could be disengaged [p. 287]. There is a switch on the pedestal, a disengaging switch on the pilot's control wheel, a disengaging switch

on the co-pilot's control wheel, and the manual disengaging of the servos by the pilot's left hand [p. 289].

If the pilot controls the plane with the auto-pilot disengaged, no malfunctioning of the auto-pilot could in any way effect the operation of the plane [p. 290]. The pilot can overpower the auto-pilot *at any time* by merely grabbing the controls, which are checked every time the auto-pilot is checked [p. 291]. Babb testified that he had never heard of a pilot's disconnect buttons becoming inoperative [p. 293].

Tracy, the petitioner's expert witness, testified that if there was any malfunctioning of the auto-pilot [p. 268] there would in all reasonable probability be some indication of that fact to the pilot [pp. 268-269]. He testified that:

> "At any time there is any indication of any whatsoever malfunctioning about the auto gyro it *can be taken over and handled manually by the pilot or the co-pilot.*" [p. 271, lines 12-15].

Petitioner asserted that there should have been more than one bunk on this aircraft. His own witness, Tracy, admitted that with three pilots the usual practice would be for one member to rest and the other two pilots to operate the plane [p. 274, lines 6-15]. The evidence is undisputed that there was such a bunk for the pilot.

It is also asserted that it would have been good practice to change crews at Wake Island (Op. Br. p. 10). The evidence from Captain Keating was that where there was a *two* pilot crew, the crew would be changed at

Wake Island, but that if it were a multiple crew, they would not change. The answer is obvious. With a multiple crew, the pilots can rotate a rest period in the bunk provided for that purpose [p. 756].

While the foregoing does not of course constitute all of the evidence in the voluminous record, it is sufficient to demonstrate that there was a substantial conflict, and the trial court, having heard the witnesses and the conflicts and the conflicting inferences they might reasonably have drawn therefrom, concluded that the petitioner had failed in his ultimate burden of establishing negligence.

III.

The Writ of Certiorari Should Be Refused Because the Case Does Not Involve Any Question of Public Importance.

Petitioner is again attempting to seek a review of conflicting evidence by this court. In the face of the substantial evidence in favor of the trial court's findings, it would be contrary to the long declared policy of this court to review such a conflict.

N.L.R.B. v. Pittsburgh Steamship Co. (1951), 340 U. S. 498, 95 L. Ed. 479, 482, 483;

General Talking Pictures Corp. v. Western Electric Co. (1937), 304 U. S. 175, 178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849;

United States v. Johnson (1925), 268 U. S. 222, 227, 69 L. Ed. 925, 926.

IV.

The Opinion of the Court of Appeals Is in Full Accord With Established Law Laid Down by This Court.

A. The Decision of the Court of Appeals Does Not Conflict With Other Decisions of Said Court.

Reliance is placed upon the case of *Desmarias, et al. v. Beckman,* 198 Fed. 2d 550. That case in no manner conflicts with the opinion of the court in this case. The case arose as a result of a motion to dismiss, it being *stipulated* by counsel that *if the motion was denied, judgment might be entered as prayed.*[2]

The Ninth Circuit Court of Appeals merely held in the *Desmarias* case that under the circumstances, *res ipsa loquitur* was applicable, just as the same court held in the present case. *No problem was presented as to the procedural effect of the doctrine* since defendant in that case offered no evidence and apparently was content to rely merely upon the motion to dismiss. The Court of Appeals held that the doctrine was applicable, and in keeping with *Sweeney v. Erving,* 228 U. S. 233, and other cases, that where the doctrine is applicable, it presents evidence which the trial court may consider, in the absence of contrary evidence such as was presented in the case at bar. The trial court, in that case, concluded that the inference afforded by the doctrine was sufficient. The case therefore is not in point and is clearly distinguishable.

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[2]The case of *Desmarias v. Beckman* was actually not an admiralty case, but was commenced under the Alaska Territorial Wrongful Death Act, which provided that in an action for damages for wrongful death, the recovery should not exceed $15,000.00, together with reasonable attorney's fees. (Sec. 61-7-3 of the Alaskan Compiled Laws, Annotated.) Apparently counsel in that case was willing to stipulate that if the court denied the motion to dismiss, judgment could be entered for $15,000.00 damages, plus $3,000.00 attorney's fees.

The case in no manner conflicts with the other cases set forth on page 14 of the Petition. In the case of *Bergen v. United States*, 222 F. 2d 949, a passenger apparently attempted to *prove* the cause of the derailment which caused his injuries. There is nothing in the opinion to indicate that the plaintiff even attempted to rely on the doctrine of *res ipsa loquitur*. The Court of Appeals merely held that the doctrine was applicable and sent the case back for further proceedings. No evidence had been offered by the defendant as in the case at bar.

The cases of *Smith v. Pacific Alaska Airways*, 89 F. 2d 253, and *Pacific Alaska Airways v. Mahan*, 89 F. 2d 255, are likewise not in conflict with the case at bar. In the case of *Smith v. Pacific Alaska Airways*, 89 F. 2d 253, at 254, the Circuit Court in referring to the doctrine of *res ipsa loquitur*, states:

> "It is proper for us to say that a full discussion of the applicable rule appears in *Gleeson v. Virginia Midland R. R. Co.*, 140 U. S. 435, 11 S. Ct. 859, 35 L. Ed. 458, cited in Sweeney v. Erving, 228 U. S. 233, 240, 33 S. Ct. 416, 57 L. Ed. 815."

B. The Decision of the Court of Appeals Is Not in Conflict With the Decisions of This Court and Is in Full Accord with the Cases of Sweeney v. Erving, 228 U. S. 233; C. & O. Ry. Co. v. Thompson Mfg. Co., 270 U. S. 416, and Innumerable Decisions of the Various Courts of Appeal.

The chief complaint made by petitioner is that the opinion of the Court of Appeals is in conflict with prior decisions of this court in *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, and that the case of *Sweeney v. Erving*, 228 U. S. 233, decided long after the earlier cases relied upon by petitioner, is not in point.

It is suggested that insofar as the application of the doctrine of *res ipsa loquitur* is concerned, a different principle applies in carrier cases and non-carrier cases.

This court in the *Sweeney* case, *supra*, has not suggested such a distinction and as Dean William L. Prosser pointed out in a very illuminating article on the procedural effect of *res ipsa loquitur* (20 Minn. Law Review, p. 241), although some of the earlier cases apparently made a distinction between carrier and non-carrier cases, *such distinction no longer exists.*[3]

The cases of *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115, *New Jersey R. & T. Co. v. Pollard*, 22 L. Ed. 877, *Gleeson v. Virginia Midland Ry. Co.*, 140 U. S. 435, and *Patton v. Texas & P.R.R. Co.*, 179 U. S. 658, were all decided before *Sweeney v. Erving*, 228 U. S. 233.

This court in *Jesionowski v. Boston & Maine R.R.*, 329 U. S. 452, 91 L. Ed. 416; 67 S. Ct. 401, referred to the *Sweeney* opinion at page 457 as the "decision which cut through the mass of verbiage built up around the doctrine of *res ipsa loquitur.*"

It is interesting to note that this court in the Sweeney decision specifically refers to each and every one of the cases relied upon by petitioner, and this court stated that even in a carrier-passenger case, where there was a high degree of care owing to the passenger, that this court "did not rule that the circumstances of the occurrence shifted the burden of proof upon the main issue."

Sweeney v. Erving, 228 U. S. 233, at 240.

This landmark decision which has been followed consistently by the various Circuit Courts and by countless

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[3]See Appendix.

state court decisions, set down the rule relating to the procedural effect of *res ipsa loquitur* in the following language:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff. Such, we think, is the view generally taken of the matter in well-considered judicial opinions." [p. 240].

It is interesting to note that immediately following the foregoing language, this court refers to several *carrier* cases in support of the proposition that the rule of *res ipsa loquitur* does not relieve the plaintiff of the ultimate burden of establishing negligence and *that it is upon the whole case*, a question of fact for the trial court or jury to determine whether or not the plaintiff has made out his case.

This court in the case of *Inland and Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 35 L. Ed. 270; 11 S. Ct. 653, held that the plaintiff was entitled to an instruction that the defendant's conduct was, *prima facie* evidence of

negligence. This Court, however, pointed out at page 554 that the jury was properly instructed:

> "The Court did not in this or any other instruction tell the jury that the burden of proof on the issue of defendant's negligence was shifted upon the defendant. On the contrary, the jury were afterwards expressly instructed plaintiff's whole ground of recovery is that the defendant was negligent. The burden of proof is on the plaintiff to sustain this allegation."

It has been said that if the defendant offers an explanation, it is for the jury to weigh that explanation in relation to all of the evidence, but the burden of proof remains on plaintiff and is not on the defendant by its explanation to satisfy the jury that it was not negligent. With the explanation in, the burden of proof is still entirely with the plaintiff to satisfy the jury on the whole case, including the explanation, that the defendant was negligent.

See *Griffin v. N. Y. Central R. Co.*, 98 N. Y. S. 2d 346, at 349; 277. App. Div. 323; *Lobel v. American Air Lines*, 192 F. 2d 217.

Probably one of the best statements of the rule is to be found in *N. Y. and St. Louis R. Co. v. Henderson*, 146 N. E. 2d 531 (Ohio) at page 537, where the court states:

> "Under the true rule of *res ipsa loquitur*, the inference of negligence which is drawn from the facts is placed on the scales to be weighed with any and all explanations offered by the defendant. The infer-

ence of negligence, or, as sometimes stated, the 'presumption', does not vanish when the defendant comes forward with an explanation, but on the contrary stays in the case to be considered with all other evidence by the trier of fact. The *weight* to be given this inference and its relationship to all the other evidence is solely for those determining the facts."

In *Martin v. United States*, 225 F. 2d 945 at 948, the court says, citing *Sweeney* (*supra*):

> "*Res ipsa* simply means that there arises from the circumstances of the accident an inference of negligence, which is not a presumption but a mere mechanical device that requires the trier of fact—whether judge or jury—to consider the evidence to see whether its preponderance shows the defendants negligence. The inference, *even standing alone, may be rejected by the trier of fact.*" (Emphasis added.)

In the *Martin* case the trial court expressly found as a part of the findings that the doctrine did *not* apply. The circuit court held that any error in this regard would be *immaterial* [p. 949].

Other carrier cases following the rule of the *Sweeney* case are too numerous to set forth. Some of them are as follows:

Robertson v. Washington Ry. & Elect. Co., 279 Fed. 180, at 184;

Underwood v. Capital Transit Co., 183 F. 2d 824;

Capital Transit Co. v. Jackson, 149 Fed. 439.

V.

Petitioner Is Inaccurate When He Suggests That the Court of Appeals Held as a Matter of Law That an Inference of Negligence Was Insufficient to Support a Judgment in Favor of Petitioner.

The fallacy of this point, as well as the other points which are presented in the petition, is that petitioner overlooked the fact that he is dealing with findings of fact and conclusions of law made upon conflicting evidence. There is no suggestion by the Court of Appeals that if the only evidence in the case had been the inference created by the doctrine of *res ipsa loquitur* and there had been a judgment in favor of the plaintiff, that this evidence would not have been sufficient to support such judgment. Petitioner again confounds the issue by assuming that the court was compelled to draw the inference of *res ipsa loquitur*. This court in *Sweeney v. Erving*, 228 U. S. 233, *supra*, stated that *res ipsa loquitur* merely means that the facts of the occurrence "warrant the inference of negligence, *not that they compel such an inference.*" [p. 240].

Petitioner repeats the assertion that there was no evidence tending to show that respondent acted with the utmost prudence on the occasion in question. This of course is contrary to the record and the evidence which has been heretofore set forth, which clearly created a question of fact for the trial court.

The case of *Matsumoto v. Chicago and N.W. Ry. Co.*, 168 F. 2d 496 (Pet. p. 21), is in full accord. There a judgment in favor of the plaintiff was affirmed. The key to the decision is found at page 500, where the court says, "Upon a consideration of the facts, we cannot say *as a matter of law* that the defendant has rebutted a presumption of negligence on its part." In other words, the

Appellate Court was unwilling to disturb the factual finding of the trial court and concluded that the inference or presumption of negligence was sufficient where the trial court had made a finding in accordance with the presumption. Likewise, in *Chicago and N. W. Ry. Co.*, 168 F 2d 496 (Pet. p. 21), the court points out,—

> "As previously noted, the question of whether the defendant offered a satisfactory explanation of the cause of plaintiff's injuries so as to lift its presumption of negligence is properly a question of fact for the jury."

The case of *Austerberg v. United States*, 109 F. 2d 583 (Pet. p. 21), is in full accord with the rule of law as laid down by this court in the *Sweeney* case. See particularly the Court of Appeals decision at page 591.

VI.

The Court of Appeals Committed No Error in Refusing to Reverse the Judgment, Since There Was Ample Evidence to Support the Trial Court's Findings. There Was No Requirement That the Trial Court Make a Separate Finding as to the Applicability of Res Ipsa Loquitur.

It is suggested in Point IV that the District Court refused to make a finding as to whether or not it had applied *res ipsa loquitur*. Full and complete findings were made on all issues raised by the pleadings. *Res ipsa loquitur* is a rule of *evidence*, and no useful purpose would have been served by making a finding that the court had applied or rejected *res ipsa loquitur*. The doctrine affords merely evidence which, either alone or along with other evidence, may establish negligence. The court's finding was simply to the effect that there was no negligence.

Again, petitioner takes the position that the doctrine establishes an absolute right to a judgment in his favor. This is not the law and has never been the law.

There is nothing in Rule 52b of the Federal Rules of Civil Procedure which is violative of this principle. The basis of the trial court's decision was founded in the evidence which has been heretofore set forth, indicating that in its opinion, plaintiffs, from a consideration of the whole of it, had failed to establish negligence in any respect or in any of the respects suggested by petitioners.

It is suggested that no evidence tending to establish due care in all possible respects was offered. Petitioner completely overlooks the presumption of due care to which the respondent's employees were entitled. This evidence in and of itself, just as the inference of *res ipsa loquitur*, was evidence which the trial court could consider in concluding that the pilot employees of the respondent were not negligent at or about the time of the fatal crash. Ample evidence was offered as to the condition of the plane, the condition of the crew, the inspection and servicing of the airplane, all of which would relate to the accident and which would bear upon the question of whether or not the respondent was guilty of negligence in or about the operation or maintenance of the aircraft. *Non-negligent air crashes are common* arising from a variety of causes. The trial court, upon conflicting evidence was justified in concluding that the cause of the crash, although not established was non-negligent.

Of particular significance is the case of *Danner v. Atkins*, 47 Cal. 2d 327, where a judgment in favor of the defendant was affirmed. The Supreme Court of California held that the doctrine of *res ipsa loquitur* was properly applied. The defendants were unable to explain the

cause of the accident, which involved a truck which had been parked by the defendant's employee on a slope and which subsequently left the place where it had been parked and injured the plaintiff. The only evidence presented by the defendant was an explanation of his conduct, *i.e.*, what he had done at the time he had parked the truck. The court stated at page 332:

> "Thus, even though we assume that the court could have concluded here, . . . that the cause of the accident remained unexplained, nevertheless the testimony of both Atkins and the mechanic McElyea provided direct evidence that Atkins had used due care in his handling of the truck, evidence which if believed by the trier of fact, is sufficient to rebut the inference of negligence raised by the *res ipsa loquitur* doctrine."

With respect to the basic application of the doctrine, the court states at page 332:

> "If, however, the trial court did conclude that facts existed which gave rise to the *res ipsa* inference, nevertheless, as commanded in *Druzanick v. Criley*, 19 Cal. 2d 439, 444, that doctrine, even where applicable, does not give a plaintiff an *absolute* right to a judgment in every case, and when the defendant produces evidence to rebut the inference of negligence, it is ordinarily a *question of fact whether the inference has the greater weight, or is evenly balanced, or has been dispelled or overcome.*"

Conclusion.

The only purpose of the petition is to review the sufficiency of conflicting evidence and conflicting inferences that may be drawn from the evidence presented to the trial court. No question of public interest and importance is presented, and the case is in full accord with not only the decisions of the Ninth Circuit court, but with decisions from other Circuits, as well as with the decisions of this Honorable Court. The petition for writ of certiorari should not be granted.

Respectfully submitted,

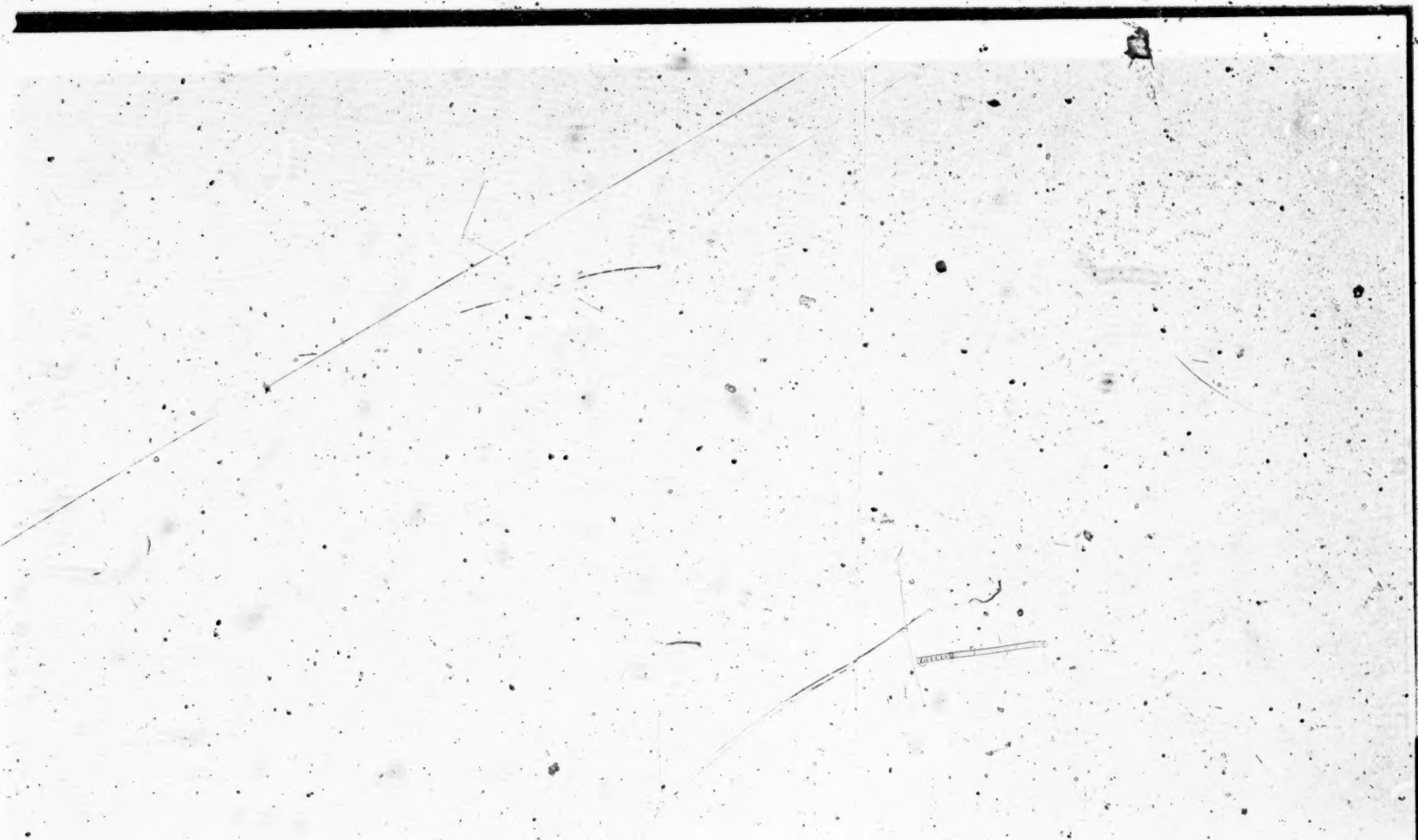
JOE CRIDER, JR.,

Attorney for Respondent.

Associate Counsel Not Members of This Court:

ELBER TIESON,

HENRY E. KAPPLER.



APPENDIX.

PROSSER: PROCEDURAL EFFECT OF RES IPSA LOQUITUR.
(20 Minn. Law. Rev., pp. 260, 261.)

In the simplest res ipsa loquitur case, there is only a permissble inference of negligence. It is significant that many of the jurisdictions which give the doctrine greater effect have been compelled to recognize, under other names, the existence of a type of res ipsa case where there is no more than an inference. The source of the presumption idea is not difficult to trace. It rests largely upon the feeling that all the evidence must be in the possession of defendant, and he should be called upon to explain, under penalty of a decision against him. But it never has been a sufficient defense in a res ipsa case that the defendant has no evidence, and knows no more about the cause of the accident than the plaintiff; and *there is no policy of the law in favor of permitting a party who has the burden of proof in the first instance to obtain a directed verdict merely by a showing that he knows less about the facts than his adversary. Galbraith v. Busch* (1935), 267 N. Y. 230, 196 N. E. 36. Another explanation lies in the fact that many of the early cases were actions by passengers against carriers, and, by analogy to the cases of damage to goods, it was considered that plaintiff had established his case by proving breach of the contract of safe transportation, and defendant thereafter had the affirmative of the issue as to his own due care. *This point of view has merged and become lost in the general 'doctrine' of res ipsa loquitur;* and carrier cases now are treated like others[1] but it has left its mark in many states. (Emphasis added.)

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[1]Dobie, Bailments and Carriers, sec. 188, p. 608; 4 Elliott, Railroads, Sec. 1644, p. 573; 3 Moore, Carriers, 2d Ed., p. 1477; 3 Hutchinson, Carriers, 3d Ed., Secs. 1413, 1414, pp. 1700 ff. But

If the thing speaks for itself, if the inference is sufficiently strong to induce the court to say that it may be drawn, why permit a perverse jury to *refuse* to draw it? If the obvious conclusion from the circumstances is that defendant has been negligent, why not direct a verdict for the plaintiff?

The answer is, that in the usual res ipsa case the inference of negligence is not exclusive, nor is it so strong that we may say as a matter of law that the jury could not reject it. *If the defendant's elevator falls while the plaintiff is riding in it, it may be inferred that there has been negligent construction, failure to inspect, negligent operation. But it may also be inferred that there was a defective cable which could not have been discovered by all reasonable care, or that some unavoidable accident has happened to the machinery. Whether one inference is more reasonable than the other is a question which cannot be determined as a matter of law, and must be left to the jury.*[2]

---

see *Gordon v. Huehling Packing Co.* (1931), 328 Mo. 123, 40 S. W. 2d 693; *Hartnett v. May Dept. Stores* (Mo. App. 1935), 85 S. W. 2d 644, to the effect that carrier cases involve a presumption, other *res ipsa* cases a mere inference. *Sweeney v. Erving*, 228 U. S. 233; *Central R. R. of N. J. v. Peluso*, 286 Fed. 661 (C. C. A. 28); *Atlas Powder Co. v. Benson*, 287 Fed. 797 (3rd C. C. A.); *Dierks Lbr. Co. v. Brown*, 19 Fed. 2d 732 (8th C. C. A.); *Cochran v. P. Hasburgh & L. E. R. R. Co.*, 31 F. 2d 769; *Blantor v. Great Atl. and Pac. Tea Co.* (C. C. A. 5).

[2] . . . but that inference is still one for the jury and not for the court. They may not believe the witnesses; *the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do;* they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant." *Swayze, J., in Hughes v. Atlantic City & S. R. R.* (1914), 85 N. J. L. 212, 89 Atl. 769, L. R. A. 1916A 927.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 284

JOSEPH M. TRIHEY, Administrator of the Estate of Maria G. Muna, deceased, *et al.*,

Petitioner,

vs.

TRANSOCEAN AIR LINES, INC., a corporation, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

I.

Respondent's Fact Statement Erroneous.

A. *Failure to Correct Auto Pilot Squawks.* In its Brief in Opposition Respondent Transocean Air Lines, Inc. (hereafter, Respondent Transocean), states (p. 5): "The evidence is undisputed however, that on June 2, 1953, the automatic pilot was removed from the plane at Oakland by witness Babb and *completely overhauled.*" Babb did no such thing. As entered in the log on May 28, 1953, the squawk read: "Auto pilot oversensitive. When engaged has abrupt nose-down tendency" [R. 212]. Respondent Slick Airways, Inc. (hereafter, Respondent Slick), should have corrected this squawk under its contract to maintain the airplane in airworthy condition [Pet. Ex. 6, R. 43]. Instead Respondent Slick ignored the

squawk when the airplane passed through its hands at Burbank, California [R. 212, 215]. When the airplane arrived at Oakland Transocean's mechanic Babb cleared the squawk by overhauling the *altitude control unit only* [R. 239], this despite the fact that he didn't check to see what gave rise to the trouble. He admitted that it could have been due to the flight gyro, which was not checked [R. 230]. Even the work that Babb did lacked required records (Civil Air Reg., (C. A. R.), Sec. 18.20) and double inspection (C. A. R., Sec. 52.45). That no further squawk on the auto pilot appeared in the log proves nothing. As stated in *Chutuk v. So. Cal. Gas Co.*, 218 Cal. 395, 399:

> ". . . If complaints had been made and no attention had been paid to them, such a fact might constitute additional evidence of the negligence of the defendant; but the fact that no complaints had ever been made relative to the situation would have no tendency to prove affirmatively that care had been exercised on the part of the defendant. And the same principle would apply with reference to the average length of the life of the gas pipe. If its age limit had expired, that fact might well be an item tending to show lack of care; but because the pipe was generally still in good, serviceable condition has no tendency to prove that in the circumstances present herein the defendant was not guilty of negligence."

In like manner, age limit of the amplifier containing the sensitive gyros responsible for the level flight of the plane when on auto pilot control had expired at the time of the crash. The operation specifications [p. 1075 of Pet. Ex. 10, R. 169] required the amplifier to be changed every 2,000 hours. Civil Air Regulations, Section 42.5, makes such specifications part of the air carrier operating certifi-

cate and prohibits operation contrary thereto. Yet when N 90806 crashed its auto pilot amplifier had over 2,100 hours on it [Pet. Ex. 8, R. 168]. Not only did this exceed authorized operating limitations (C. A. R., Sec. 42.32(d)(1)), but Slick's records show it was nearly as much as the last two previous overhauls of the same unit [Pet. Ex. 8, R. 168], on the second of which said records show the gyro rotor bearings were found frozen [Pet. Ex. 30, R. 545].

B. *Failure to Change Crews at Wake Island.* Respondent Transocean states in its said brief (pp. 12-13): "The evidence from Captain Keating was that where there was a *two* pilot crew, the crew would be changed at *Wake Island, but that if it were a multiple crew, they would not change.*" Captain Keating, Transocean's vice president, did not so testify. He did testify as follows [R. p. 746]:

> "Q. Would you say it is good practice to change flight crews at Wake, Captain? A. It depends: If it is a single crew; if it is a two-pilot crew, yes, we always change crews at Wake Island. If it is a multiple crew, we do not.
>
> Q. I didn't ask you whether you did it. I asked you whether you consider it to be good practice? A. I consider it to be good practice."

Captain Keating further testified that

> "Transocean had aircraft other than N 90806 flying regularly over the Pacific, and it wouldn't have been any particular trouble to ferry a relief crew out to Wake" [R. 747].

Captain Tracy (Petitioner's witness) with 17 years experience [R. 260] stated this was the usual procedure, so "a fresh crew would be on deck to take the trip" [R. 262].

Captain Buckalew (Transocean's witness) testified that this was a "sound practice" [R. 692]. Yet Transocean failed to follow this practice here. Instead, it worked the same crew straight through—both ways.

II.

Respondent's Law Unsupported.

Respondent Transocean states in its said brief (p. 11) that its employees "are of course entitled to the presumption that they take ordinary care for their own concerns and that they obey the law." A like reference appears therein at page 22. Transocean cites no authority for this, and there is authority that the presumption of due care does *not* apply as against a passenger in a carrier case (*Parrot v. Wells Fargo & Co.*, 82 U. S. 524, 538). That no such presumption exists in law is the inevitable conclusion to be drawn from *Des Marias v. Beckman*, 198 F. 2d 550 (C. A. 9), and *Haasman v. Pac. Alaska Air Express*, 100 Fed. Supp. 1 (discussed in our petition, pp. 10, 13, 21, 23).

Without such presumption, we submit that the inference of negligence which arises from application of the doctrine of *res ipsa loquitur* in this case is not dispelled, and that petitioner is entitled to judgment as a matter of law.

For reasons stated in our petition and herein, we pray that the Writ of Certiorari issue.

Respectfully submitted,

A. J. BLACKMAN,

Attorney for Petitioner.